(13)

No. 96-795

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE BOARD'S STANDARD IS ARBITRARY, CAPRICIOUS AND NOT JUSTIFIED BY THE PURPOSES OF THE ACT.

The Board and the AFL-CIO seem to suggest that since there is no statutory right to poll, employers should be grateful for any limited ability to poll they might be granted by the Board and should not be heard to complain. (Bd. Br. 20, AFL-CIO Amicus Br. 7.) That argument frames the issue backwards. Employers are not granted a limited set of rights by the Board. Rather, they start out with a full set of freedoms to act and communicate, limited only by such regulations as are authorized by statute, promulgated by the Board and enforced by the courts under the appropriate standard of review. The polling standard applied by the Board in this case is arbitrary, capricious, and contrary to the purposes of the Act.

A. It is arbitrary and capricious to equate polling with withdrawal of recognition.

The most obvious problem with the Board's polling standard is its irrational treatment of polling as tantamount to unilateral withdrawal of recognition. By setting the same standard for both polling and unilateral withdrawal of recognition, the Board treats them, for all practical purposes, as the same. But clearly, they are not the same.

To state only the most obvious difference, with a poll, there is always the possibility that the union might win. Moreover, the effect of the Board's standard is to virtually

ban polling (except when it is superfluous), a result the Board professes not to seek. *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) (describing Board's polling standard as "tantamount to an outright prohibition of employer-sponsored polls"); *Thomas Indus. Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982) (same); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981) (same). Because polling is undeniably preferable to unilateral action, the Board's use of a single standard for both is arbitrary and capricious.

B. The process of polling is not disruptive.

The concerns about polling cited by the Board fail to support its irrational conclusion that polling is tantamount to withdrawal of recognition.

The mere process of polling does not disrupt collective bargaining. (Bd. Br. 27.) Polling itself does not change the collective bargaining relationship, unless employees choose not to be represented.[1] The Board's concern that the prospect of a poll might cause the union to react badly by, for example, making excessive demands in bargaining (Bd. Br. 27), is perhaps a factor for an employer to consider, but is hardly a basis for restricting the

[1] Polling might require a temporary delay in signing a labor contract, in order to prevent the contract bar from coming into effect. That would appear to be within the contemplation of *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1759 (1996): "And, of course, it [the employer] could have withdrawn its offer to allow it time to investigate while it continued to fulfill its duty to bargain in good faith with the Union." *See American Protective Services, Inc. v. NLRB*, 113 F.3d 504 (4th Cir. 1997).

employer. The argument that polling would divert the union from representing its members to defending itself is also misguided. (Bd. Br. 27.) In an incumbent union situation, employees will decide whether or not to retain the union based on its track record in representing them.

The Board's argument that polling can be used by employers to keep the bargaining relationship in "a recurrent state of turbulence" (Bd. Br. 19) exaggerates the amount of polling that is possible.[2] Contrary to the Board's impression (Bd. Br. 26), Petitioner does not contend that polling must be permitted periodically as a matter of course or when the employees' allegiance to the union is free from doubt. Nor is polling unduly suggestive or usable to "unsettle" employees (Bd. Br. 19), since, even under Petitioner's position, employers would be permitted to poll only when employee support is already unsettled.

The Board's procedural guidelines for polling[3], set forth in *Struksnes Construction Co.*, 165 N.L.R.B. 1062

[2] There is no evidence that polling has become a problem in the Fifth, Sixth and Ninth Circuits, where the Board's polling standards have been unenforceable for some time.

[3] The Board's contention that Petitioner failed to preserve its arguments regarding the statutory authority of the Board to regulate polling under Section 8(a)(1) misstates Petitioner's position. (Bd. Br. 24.) First, Petitioner has never argued that the Board is totally without authority to regulate polling. Rather, Petitioner's position is that nothing in Section 7 or Section 8(1)(1) warrants discriminating between polls in which unions stand to gain and polls in which they stand to lose. Second, Petitioner has consistently argued that the Board's polling standard is contrary to the Act. (*See* Brief of Petitioner filed in Court of Appeals at 19-20; Petition for Certiorari at 6, 8.)

(1967) and *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989) (adding requirement of advance notice), are adequate to regulate the process by which polls are conducted.[4] In particular, the requirement of advance notice ensures that the union has an opportunity to communicate with employees prior to the poll. If the union is still concerned that the poll will not be conducted in a proper manner (See AFL-CIO Amicus Br. 22-24), it is free to petition the Board for an election, before or after the employer poll.[5]

C. Polling reveals facts employers have a right to use.

Plainly, it is not the *process* of conducting a poll, but the *results* of the poll, that really poses a risk to unions. The source of that risk, however, is not the employer; it is the employees. In this regard, the Board's limitation on polling is extraordinary, for it limits access to facts by a means that in other circumstances (a non-union setting) is not only permitted, but for which the Board has prescribed procedures. *Struksnes, supra.* A limitation on polling might make sense if the employer had no legitimate use for the facts. But the exact opposite is true. It is

[4] The ALJ found that Petitioner complied with those guidelines. (Pet. App. 56-60.) The Board found it unnecessary to decide whether Petitioner provided sufficient advance notice of the poll to the Union (Pet. App. 26, n. 9), but found no procedural violation, as alleged in the Complaint. (Pet. App. 56.)

[5] A petition for a Board election would block an employer poll. *Struksnes Construction Co.*, 165 N.L.R.B. at 1063.

entirely legal for an employer to withdraw recognition from a union that has lost majority status.

D. Preserving minority unions is not the ultimate goal of the Act.

To justify its restrictive policy, the Board argues that its policy promotes "stability in collective bargaining relationships," which the Board views as the "ultimate goal of the Act." (Bd. Br. 8.) However, ensconcing unions that have lost majority support is not a purpose of the Act. If it were, the presumption of continued majority support would be irrebuttable. Rather, the goal of the Act is to "promot[e] stability in collective-bargaining relationships, without impairing the free choice of employees." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987), *quoting, Terrell Machine Co.*, 173 N.L.R.B. 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

The presumption of continued majority support is not only rebuttable, but relatively vulnerable. It gives way not only to proof that the union does not in fact enjoy majority status, but also to good-faith reasonable *doubt* of the union's support. Accordingly, Petitioner submits that the policy of stability underlying the presumption of majority support is not so forceful as to restrict the collection, by accurate and otherwise legitimate means, of evidence of what employees really want.[6]

[6] In addition, if, as Petitioner shows below, the Board has in practice silently abolished the good-faith doubt standard, and requires proof of actual loss of majority support in all cases,

The empirical foundation for the presumption of majority support may be especially weak when the employer is a successor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 58 (Powell, J. dissenting). The notion that employees would ignore the difference between Mack Trucks, Inc. and Allentown Mack underestimates their economic rationality. Allentown Mack employees had no reason to doubt that they would be treated fairly by their new employer, had nothing to gain by putting pressure on their fledgling employer to pay more, and stood to save $420 per year apiece by not paying union dues. Because Allentown Mack's employees never before had an opportunity to decide whether to bargain collectively with their new employer, it cannot be said that the presumption of majority support in any way gave effect to employee choice. From the employees' perspective, the situation was similar to the organizational phase, in which employer polling is freely permitted to test a demand for recognition.

Recognizing that the presumption may have little empirical support, the Board also explains the application of the presumption as a policy decision, designed to permit the union to bargain for a new contract without worrying about obtaining immediate results and, in the case of a successor, to develop a relationship with the new employer. *Fall River Dyeing & Finishing*, 482 U.S. at

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then it should not bar access, by the only practical means available, to such proof. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797, 798 (1990) (Rehnquist, C.J., concurring; Blackmun, J., dissenting). The lesser standard adopted by three courts of appeals is, in this light, an effort to revitalize the good-faith reasonable doubt standard.

39.[7] Because of the contract bar rule, the only time a union can lose its bargaining rights is when the contract is up for negotiation. Thus, there will always be some tension between the union's interest in negotiating a new contract (and gaining the protection of a new contract bar) and the need to provide an outlet for employee choice. In the successor context, the policy of stability remains vulnerable to the possibility that employees do not want the union to develop a relationship with the new employer in the first place.[8]

E. Petitioner's arguments cannot be dismissed on the grounds that they were made by an employer.

The Board criticizes Petitioner for seeking to act "as its workers' champion" against "their" union, as if "the free choice of employees" were a statutory policy only the Board or unions are permitted to cite. (Bd. Br. 22.) The policy of free choice is central to the Act. Employers have

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[7] In that case, the Court noted that a successor employer can withdraw recognition based on good-faith doubt of the union's majority status or proof of loss of majority status. It then added, "Moreover, an employer, unsure of a union's continued majority support, may petition the Board for another election." 482 U.S. at 41, n.8. The problem, of course, is that to obtain an election, the employer must be sufficiently "unsure" as to enable it to withdraw recognition unilaterally.

[8] As *Auciello, supra*, demonstrates, there is no ideal moment to withdraw recognition from a union. The timing ultimately depends on when employees create doubts about their continued support for the union. Once they do, an employer must act promptly.

a strong and legitimate interest in seeing that the Board does not violate it by imposing, on both employers and employees, minority unions.[9]

In this case, if Petitioner is not representing its employees' interest (as well as its own, the two being demonstrably congruent), it is difficult to see who else is representing that interest. It certainly is not the Union, which was rejected by a vote of 19 to 13 in a secret ballot poll and which has not sought another election in the six years since then. Nor is it the Board, which is attempting to impose on the employees the same Union.

F. Decertification is not the only option.

The Board's alternative would be to provide the employees no "champion" and to leave them to protect their own interests in self-determination by filing a decertification petition (RD petition).[10] (Bd. Br. 22.) However,

[9] The Board argues that the employer's concerns are alleviated by providing a defense against an unfair labor practice charge that it unlawfully recognized a minority union. (Bd. Br. 21.) The employer's interests are not limited to avoiding liability in the unlikely event of such a charge. An employer's main interest is in receiving the benefit of the substantive policy of the Act, which says that it is not required to bargain with a minority union.

[10] Contrary to the Board's argument (Bd. Br. 22, n. 3) unfair labor practice charges block petitions automatically. The *NLRB Casehandling Manual (Part Two), Representation Proceedings* § 11730.1 states, "action on the petition will normally be suspended pending investigation of the charge." In certain kinds of charges, including refusal to bargain charges (which are typically filed by unions faced with decertification

under long-standing Board precedent, such petitions, which require employees to master a number of obscure Board rules, are not the only outlet for employee choice. Rather, employers are permitted to give effect to employee choice, by withdrawing recognition based on evidence that the union has actually lost majority status, or even on good-faith reasonable doubt that a majority continue to support the union. In this context, polling is simply a non-coercive and otherwise permissible means of ascertaining facts that an employer is completely privileged to use.

G. The Board's policy is not justified by reference to other policies.

Everyone would agree that it is better for an employer to allow employees to decide, in a secret ballot poll, whether to be represented, rather than to act unilaterally on the basis of the employer's doubts, however reasonable. The Board, unable to explain away the fundamental irrationality of using a single standard for polls and unilateral withdrawals of recognition, instead argues that its standard does not really render polling superfluous, because it is conceivable that an employer with good-faith reasonable doubt might wish to poll in order to acquire proof of loss of majority support.[11] (Bd. Br. 36-38.)

movements), the block is not lifted until the General Counsel denies an appeal of the Regional Director's dismissal of the charge, unless the Board specifically directs that it be lifted earlier. *Id.* at § 11730.3.

[11] In a footnote, the Board writes, "Similarly, if the union loses the poll and the employer withdraws recognition based on

In making that argument, the Board supposes that the good-faith reasonable doubt standard requires less evidence than proof of loss of majority support. (Bd. Br. 38.) While that is true in theory, in practice the Board has abolished the good-faith reasonable doubt test and demands proof of loss of majority support in all cases. See Section II, *infra*.

Moreover, it is irrational to use the same standard (regardless of what standard is chosen) for polling and withdrawals of recognition. The use of a single standard ensures that there is no incentive to seek more reliable information before taking drastic action.[12]

H. The Board appears to recognize that its current policy is problematic.

The Board's Brief refers to its policy as its "existing" or "current" approach, (Bd. Br. 4, 5, 14, 21, 42), discusses

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the poll results, the employer can defeat an unfair-labor-practice claim simply by showing that before the poll, it had a good-faith reasonable doubt regarding the union's majority (and not necessarily proof of an actual loss of majority support)." (Bd. Br. 38, n. 10.) If that is so (and Petitioner agrees that it should be so), the Petitioner should have prevailed in this case.

[12] The Board observes that the standard adopted by three courts of appeals creates another anomaly, by permitting polls based on less evidence than the Board requires for a Board-conducted RM election. (Bd. Br. 40, n. 12.) The only reason for that anomaly is the Board's irrational policy of requiring the same evidence for a Board-conducted election as for a unilateral withdrawal of recognition. The Board's General Counsel has proposed a change in the Board's policies in this area. (Bd. Br. 41.)

alternative proposals, (Bd. Br. 20, 41)[13] and repeatedly argues that the issues in this case should be remanded to the Board. (Bd. Br. 16, 17, 18, 29, 34, 35, 36, 39, 40, 41, 42.) Petitioner submits that the Board's unfair labor practice finding was based on a defective existing standard and should be denied enforcement, without a remand. If the Board wishes to develop new policies in the future, it can do so without Petitioner being involved.[14]

II. THE BOARD HAS SILENTLY ABOLISHED ITS GOOD-FAITH REASONABLE DOUBT STANDARD.

The Board seeks credit for continuing to apply the original understanding of the good-faith reasonable doubt standard, while at the same time arguing that it is a "rigorous, fact-specific" standard. (Bd. Br. 38.) The Board cannot have it both ways. Since the Board has chosen to represent that the original understanding of that standard remains alive, it should have given the Petitioner the

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[13] One proposal, to which the AFL-CIO's amicus brief devotes considerable attention, would bar unilateral withdrawals of recognition. The Board rule permitting unilateral withdrawals of recognition is long-standing, *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951) and recently applied in *Auciello Iron Works, Inc. v. NLRB*, *supra*. It is still the law under which this case must be decided.

[14] It would not be fair to apply any newly developed standard to conduct that occurred in 1991. *See generally Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The Petitioner's poll was permissible under the original understanding of the good-faith reasonable doubt standard (See Section II, *infra*) which in effect was revitalized by the standard adopted by three courts of appeals.

benefit of that standard (literally, "the benefit of the doubt") in this case.

A. The Board tacitly abolished the good-faith reasonable doubt standard.

Good-faith reasonable doubt is not, under any standard English usage, a "rigorous, fact-specific" standard. It is, by its terms, the exact opposite. The Board's original description of the standard merely required good-faith and "some reasonable grounds" to believe the union had lost majority support. *Celanese Corp. of America*, 95 N.L.R.B. 664, 673 (1951). Under that standard, the evidence was considered cumulatively. *Id.* Application of that standard did not require any special expertise. "[T]he reasonableness of the employer's doubt must be determined on the basis of how a reasonable person would assess the probabilities." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 811 (1990) (Scalia, J., dissenting).

Although the Board professes to rely on the good-faith reasonable doubt test,[15] both courts and commentators have observed the Board's virtually exclusive reliance on "head counts." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 797, 800 (Rehnquist, C.J., concurring,

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[15] The Board's dictum in *Liquid Carriers Corp.*, 319 N.L.R.B. 317, 319 n.10 (1995), *enf'd*, 101 F.3d 691 (3d Cir. 1996), that it does not require proof of anti-union statements by each individual worker is no more persuasive than its argument in this case. In that case, the Board found that union opposition to retention of strike replacements did not create a good-faith reasonable doubt.

Blackman, J., dissenting);[16] *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990); Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U.L. Rev. 387, 394 (1995). Flynn, an author cited in the Board's Brief (Bd. Br. 20, 42), describes the Board's practice as follows:

> [W]ith respect to Labor Board policy, what you see is not necessarily what you get. Indeed, there is often a significant disparity between the Board's articulated adjudicative standard and its application of that standard. This dichotomy, which I will call the de jure/de factor gap, is typified by a test that sounds flexible, but the Board applies in a rigid, near-absolute fashion. Perhaps the best example of this phenomenon is the Board's standard regarding employer withdrawals of recognition.

Id. at 393-94 (footnotes omitted).

Although the Board professes to consider the totality of circumstantial evidence, in practice it picks the evidence apart and invokes counter-intuitive evidentiary rules that rule out most such evidence, piece by piece. *See e.g., Wallkill Valley General Hosp.*, 288 N.L.R.B. 103 (1988), *enf'd*, 866 F.2d 632 (3d Cir. 1989). For example, the Board will not normally consider decline in union membership or check-off authorizations, *Id.* at 108; non-participation

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[16] The Board's reliance on the majority opinion in *Curtin Matheson*, 494 U.S. at 788, n.8, is misplaced. The issue in that case was the Board's no-presumption approach to strike replacements. The majority in *Curtin Matheson* refused to *assume* that the Board had abandoned the good-faith doubt standard solely by adopting the no-presumption rule.

in a strike, *Id.* at 108; dissatisfaction with the quality of representation, *Century Papers, Inc.*, 284 N.L.R.B. 1151, 1154, 1158 (1987); inactivity by the union, *Petoskey Geriatric Village Inc.*, 295 N.L.R.B. 800, 804 (1989); and union demands to displace strike replacements, *Liquid Carriers*, 319 N.L.R.B. at 320.

The Board is equally hostile to direct evidence of anti-union sentiment. The Board views "with suspicion and caution" reports by employees concerning the views of others. *Wallkill Valley Hospital*, 288 N.L.R.B. at 109. As the Court of Appeals in this case stated, "The Board has consistently questioned the reliability of reports by one employee of the antipathy of other employees toward their union." (Pet. App. 11.)[17] To be considered, such evidence must be "specific and detailed." (Pet. App. 12.)

Having virtually ruled out circumstantial evidence and reports by employees concerning the views of others, practically the only evidence the Board will consider is statements by individual employees. Employers cannot, however, question employees individually about their support for the union. Even when employees make spontaneous statements, the Board is hostile to the evidence. As the Court of Appeals stated in this case, "Board precedent also holds that an employee's statements of dissatisfaction with the quality of union representation may not

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[17] Citing *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 n.11 (1989); *Louisiana Pacific Corp.*, 283 N.L.R.B. 1079, 1080 n.6 (1987), *Sofco, Inc.*, 268 N.L.R.B. 159, 160 n.10 (1983); *Bryan Mem. Hosp. v. NLRB*, 814 F.2d 1259, 1262 (8th Cir.), *cert. denied*, 484 U.S. 849 (1987); *NLRB v. Cornell of California, Inc.*, 577 F.2d 513, 516 (9th Cir. 1978).

be treated as opposition to union representation." (Pet. App. 10.)[18] "Employee statements offered to establish a reasonable doubt of the Union's majority status 'must demonstrate a clear intention by the employees not to be represented by the Union.' " *AMBAC International*, 299 N.L.R.B. 505, 506 (1990), *quoting Royal Midtown Chrysler Plymouth, Inc.*, 296 N.L.R.B. 1039 (1989).

In addition, the Board relies on burdens of proof that might be appropriate if the standard were certainty, but are misplaced when the issue is reasonable doubt. When the employer relies upon circumstantial evidence alone, "the evidence must establish with a reasonable degree of *certainty* that there is an objective basis for doubting that the majority of unit employees desire representation by the union." *Liquid Carriers*, 319 N.L.R.B. at 320 (emphasis added). The "employer's burden of establishing good-faith doubt is a heavy one." *Petoskey Geriatric Village*, 295 N.L.R.B. at 803. In *Laidlaw Waste Systems, Inc.*, 307 N.L.R.B. 1211 (1992), the Board wrote an absurdly self-contradictory decision. In that case, the Board overruled two prior decisions requiring that doubt be proved by clear and convincing evidence.[19] It held that the standard of proof is preponderance of the evidence. In the next paragraph of the same decision, the Board ruled that the

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[18] Citing *Destileria Serralles, Inc.*, 289 N.L.R.B. 51 (1988), *enf'd*, 882 F.2d 19 (1st Cir. 1989); *Wagon Wheel Bowl, Inc. v. NLRB*, 47 F.3d 332, 335-36 (9th Cir. 1995).

[19] The Board overruled *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 (1989) and *Hutchinson-Hayes International, Inc.*, 264 N.L.R.B. 1300 (1982). Compare, *Bolton-Emerson, Inc.*, 293 N.L.R.B. 1124 (1989) (preponderance of evidence standard applied), *enf'd*, 899 F.2d 104 (1st Cir. 1990).

evidence introduced to support a good-faith reasonable doubt still must be "clear, cogent and convincing." *Id.* at 1211-12.

The Board's undeclared war on the good-faith doubt standard is sufficiently apparent to Board insiders that in one recent case, *Alcon Fabricators*, 317 N.L.R.B. 1088 (1995), *vacated and remanded*, 1997 U.S. App. LEXIS 10646 (6th Cir. 1997), the ALJ concluded that the good-faith reasonable doubt defense was no longer available. Although the Board dropped a footnote disclaiming reliance on the ALJ's discussion of the "continued viability of the good-faith-doubt defense," 317 N.L.R.B. 1088, n.2, it adopted his conclusions without further discussion.

B. The Board's departure from precedent is exemplified by its treatment of the evidence in this case.

Rather than acknowledge that it has, in practice, silently abolished the good-faith reasonable doubt standard, the Board has chosen to make the representation that the original understanding of that standard remains alive, citing a line of cases in which employers successfully made the required showing. (Bd. Br. 31, n.8.)[20] If the Board wishes to be taken at face value in making that representation, then, based on precedent cited by the

[20] The most recent decision cited by the Board in support of its argument that employers can successfully make the required showing by anything other than a strict head count was issued in 1984. (Bd. Br. 31, n. 8.)

Board, the evidence in this case was surely sufficient to establish a good-faith reasonable doubt. See *J & J Drainage Prods. Co.*, 269 N.L.R.B. 1163 (1984), cited by the Board to prove that employers can successfully show good-faith reasonable doubt. (Bd. Br. 31, n. 8.)

In this case, the Board described Shop Steward Ron Mohr's conversation with Robert Dwyer, President of Petitioner, as follows:

> In December, prior to the interview process, Dwyer and employee and union steward for the service employees, Ron Mohr, engaged in a conversation in which the Union was discussed. Dwyer remembers it taking place in the shop and beginning by Dwyer asking how things were going. He said Mohr told him that with a new company, if a vote was taken, the Union would lose and that it was his feeling that the employees did not want a union. Dwyer replied that it was up to the employees and he would go either way.

(Pet. App. 53.) Based on those facts, the Board found that "Respondent could not rely on Mohr's statement as a basis for doubting the Union's majority status." (Pet. App. 24.)

In *J & J Drainage*, the Board made these findings:

> On either February 23 or 24, 1981, Smith [VP and General Manager of the employer] had a conversation with Pinkston [shop steward] in the culvert shop at the Hutcheson facility. Smith testified, "I had asked Mrs. Pinkston, just in general conversation, how things were going, and she indicated to me that Mr. Daugherty [union official] had called her and had indicated

> that he would like to arrange a meeting in Hutchinson so he could visit with the people, and that she had told him that it really wasn't necessary because the people were not interested in the Union."

269 N.L.R.B. at 1167. Based on those facts, the Board found, "The fact that Pinkston was one of the two union stewards at the plant [the same as Mohr], and the fact that the unit was relatively small with 32 employees [the same number as Petitioner] both are matters which would warrant giving Pinkston's comment more weight." 269 N.L.R.B. at 1171. The Board concluded that the employer "may rely on her statement in support of the Respondent's reasonable doubt." *Id.*

Apart from the shop steward's statement, there was far more evidence of disaffection for the Union in this case than in *J & J Drainage*.[21] The Board attempted to distinguish *J & J Drainage* on the grounds that the shop steward's statements in that case were made three days after the successor employer took over the plant. (Pet. App. 27, n. 7.) In this case, the steward's statements were made before the sale took place. It is difficult to see why that should make a difference, especially in view of the Board's oft-cited presumption that union sentiment carries forward.

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[21] The only other evidence of anti-union sentiment in that case was that the union had few dues paying members, a factor that generally can arise only in a right-to-work state and which the Board normally accords no weight. Here, there were statements from other employees casting doubt on their support for the union.

In sum, the Board should be required to live up to its representations. If, as the Board argues, *J & J Drainage* represents the proper application of the good-faith reasonable doubt standard, then Petitioner had a right to conduct a poll.

CONCLUSION

For the reasons set forth above, and in the Petitioner's opening Brief, Allentown Mack respectfully requests that the Court reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and remand with instructions to deny the Board's application for enforcement.

Respectfully submitted,

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